

No. 48623-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

BRENDA WING,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR LEWIS COUNTY

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APPELLANT'S OPENING BRIEF

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RICHARD W. LECHICH  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

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## **A. INTRODUCTION**

When a criminal defendant enters into a plea agreement with the prosecution, the defendant is entitled to the benefit of the bargain unless the defendant violates the agreement. Before a defendant may be held in violation of a plea agreement, constitutional due process requires that the court hold an evidentiary hearing. Brenda Wing entered into a plea agreement and pleaded guilty to offenses. The State agreed to not seek an exceptional sentence. The prosecution later alleged that Ms. Wing had violated the agreement and sought an exceptional sentence. To find Ms. Wing had violated the agreement, however, required proof that she “provided a false statement regarding a material fact as demonstrated by irrefutable evidence agreed to by the defense, or in the absence of agreement,” by failing two polygraphs. Ms. Wing did not agree and she had not failed two polygraphs. Without holding an evidentiary hearing, the court ruled Ms. Wing violated the agreement by providing false statements, and imposed an exceptional sentence. Because the trial court did not hold an evidentiary hearing as required by due process, disregarded the plain language of the agreement, and erred in finding material breaches, this Court should reverse.

## **B. ASSIGNMENTS OF ERROR**

1. In violation of due process as guaranteed by article I, § 3 of the Washington Constitution and the Fourteenth Amendment to the United States Constitution, the trial court erred in not holding an evidentiary hearing to determine whether Ms. Wing violated the plea agreement.

2. The trial court erred in determining that the State had met its burden to prove that Ms. Wing had materially breached the plea agreement.

3. If it is a finding, the trial court erred in entering finding 1 in its order determining that Ms. Wing breached the plea agreement. CP 168.

4. If it is a finding, the trial court erred in entering finding 2 in its order determining that Ms. Wing breached the plea agreement. CP 168.

5. If it is a finding, the trial court erred in entering finding 3 in its order determining that Ms. Wing breached the plea agreement. CP 168.

6. If it is a finding, the trial court erred in entering finding 4 in its order determining that Ms. Wing breached the plea agreement. CP 168.

7. The trial court erred in accepting the State's filing of an amended information with aggravators, deeming that Ms. Wing had stipulated to these aggravators, finding that these aggravators applied, and in imposing an exceptional sentence based on these aggravators.



8. Because the trial court failed to conduct an adequate inquiry into Ms. Wing's ability to pay, the court erred in imposing discretionary legal financial obligations.

### **C. ISSUES**

1. Before a defendant may be held to have violated a plea agreement, constitutional due process requires an evidentiary hearing. The State alleged that Ms. Wing violated the plea agreement by being dishonest during an interview. Without holding an evidentiary hearing, the trial court determined that Ms. Wing violated the agreement. Was Ms. Wing deprived of due process of law, requiring reversal and remand for an evidentiary hearing?

2. When plain and unambiguous, the terms of a contract are applied as written. If possible, all terms should be given meaning. Under the terms of the agreement, for the State to be relieved of its promise, it bore the burden of proving that Ms. Wing "provided a false statement regarding a material fact as demonstrated by irrefutable evidence agreed to by the defense, or in the absence of agreement, by the defendant's failure of two polygraphs administered by licensed polygraphists." In the name of "reasonable construction," the trial court disregarded the language "as demonstrated by irrefutable evidence agreed to by the defense, or in the absence of agreement." Did the trial court err?

3. Ms. Wing did not agree that she provided a false statement regarding a material fact as demonstrated by irrefutable evidence. And she did not fail two polygraphs administered by licensed polygraphists. Did the court err in ruling that Ms. Wing violated the plea agreement?

4. The State bore the burden of proving by irrefutable evidence that Ms. Wing provided a false statement of material fact. In a lengthy interview, Ms. Wing described in detail the physical abuse of the decedent, a boy who had been in her and her husband's care. The timeframe involved recalling matters which occurred over about a two-month period. During the interview, Ms. Wing did not disclose that when she told her husband that the decedent had placed his hands over their baby's mouth, this was untrue. In later interviews, Ms. Wing recalled additional minor details regarding the abuse of the decedent. Did the trial court err in concluding that Ms. Wing had materially breached the agreement?

5. Before imposing discretionary legal financial obligations, the trial court must inquire into the defendant's ability to pay. Courts should be cautious in imposing legal financial obligations if the payment requirement has to be set at a low amount per month. In sentencing Ms. Wing to 416 months of total confinement and without inquiring into her ability to pay, the court imposed \$3,000 in legal financial obligations,

requiring payment of \$10 per month while incarcerated and \$25 per month when released. Did the court err in imposing legal financial obligations?

#### **D. STATEMENT OF THE CASE**

In connection with the death of a young boy, the State charged Brenda Wing with homicide by abuse, or in the alternative, manslaughter in the first degree. CP 1-2, 12. The State further alleged aggravating factors as to both offenses. CP 2-3.<sup>1</sup>

As stated in the affidavit of probable cause, on October 5, 2014, emergency services responded to a call about an unresponsive three-year-old boy, who was later pronounced dead. CP 5. The child had been left in the care of Danny and Brenda Wing,<sup>2</sup> a married couple with three children of their own. CP 5-8; CP 64. In addition to their children, an eighteen-year-old named Zackery Kidder resided with the Wings. CP 5. The preliminary cause of death was believed to be chronic battered child syndrome. CP 8.

On May 7, 2015, Ms. Wing entered in an agreement with the Lewis County Prosecutor's Office. CP 46-48 ("Proffer Agreement for

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<sup>1</sup> The State alleged that Ms. Wing used her position of trust, or confidence, to facilitate the commission of the offense, RCW 9.94A.535(3)(n), and that she knew or should have known that the victim of the offense was particularly vulnerable or incapable of resistance, RCW 9.94A.535(3)(b). CP 1-2.

<sup>2</sup> For clarity and ease of reading, Mr. Wing is referred to by his first name, Danny. No disrespect is intended.

Brenda A Wing”).<sup>3</sup> Ms. Wing agreed to truthfully disclose what she knew about the abuse and death of the boy, J. CP 46 (term 1). The State was permitted to corroborate her statements through an unspecified number of polygraph examinations with the defense examiner being given an opportunity to review the polygraph data. CP 46-47 (term 1). The State agreed to dismiss the current charges and to file other charges without aggravators. CP 46 (terms 1 and 4). These charges were manslaughter in the first degree, third degree assault, two counts of possession of a controlled substance, heroin, and two counts of tampering with a witness. CP 46-47 (terms 1 and 4). Ms. Wing agreed to plead guilty to these charges. CP 46 (terms 1 and 4). The standard range sentence would be 146 to 194 months of confinement. CP 46 (term 1). Though the agreement was signed and dated May 7, 2015, the parties agreed that Ms. Wing would enter her plea of guilty to the amended charges between May 1 and May 6, 2015. CP 47 (term 6).

Also on May 7, the State filed an amended information alleging the six charges recounted in the agreement. CP 15-17. Ms. Wing entered guilty pleas to these charges, which the court accepted. 5/7/15RP 6-10. CP 19-27. Ms. Wing executed a waiver of her right to be sentenced within 40 days. 5/7/15RP 10.

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<sup>3</sup> A copy of this agreement is contained in “Appendix A.”

On June 2, 2015, Ms. Wing participated in a recorded interview with a detective. CP 49-106. A prosecutor and Ms. Wing's attorney were present. CP 49. In this extensive interview, the transcript of which is 58 pages of mostly single spaced text, Ms. Wing explained the circumstances surrounding how J came into her and Danny's care, the abuse they inflicted, and J's death. CP 49-106.

Ms. Wing disclosed that Danny had a history of perpetrating domestic violence upon her. CP 51, 53-55. For example, Danny had hit her while pregnant, resulting in a miscarriage. RP 51. While frightened of Danny, Ms. Wing felt dependent upon him. CP 56.

Ms. Wing met J while she, Danny, and their children were living in a hotel. CP 56. Ms. Wing had recently given birth to her third child on April 30, 2014. CP 58. J's mother was Nicole Warner. 1/22/16RP 46. While the record is unclear, Ms. Warner appears to be an adoptive relative of Danny's. RP 56. Ms. Warner was going through a difficult time and there was much drug use occurring at her home. CP 57. Ms. Wing offered to watch J on the Fourth of July and Ms. Warner accepted. CP 54-58. Ms. Wing and Danny also took care of J overnight on two other occasions. CP 58, 60. After changing J's diaper, Ms. Wing thought J might have been molested at his home. CP 61-62. Danny confronted Ms. Warner, but she did not think that "Mikey" was molesting J. CP 62.

While the record is unclear, “Mikey” appears to be a man that Ms. Warner was living with at the time. CP 62.

Danny, Ms. Wing, and Ms. Warner decided that J would stay with the Wings. CP 62-63. This would provide Ms. Warner the opportunity to become stable. CP 62. Sometime in August, they met in a park. See CP 63. All three adults signed a letter written by Danny, stating that custody of J was transferred from Ms. Warner to Danny and Ms. Wing for one year, from July 31, 2014 to July 31, 2015. CP 63. This July 31, 2014 date was “backdated.” CP 63. J was in good health. CP 64.

Danny, Ms. Wing, and the four children moved from hotel to hotel. During this time, Danny and Ms. Wing used heroin along with prescription pain pills. CP 66, 68-69. They used marijuana and would blow the smoke into the children’s directions so they would inhale it. CP 104. They also gave their children edibles containing marijuana. CP 106.

Danny and Ms. Wing punished the children through timeouts or spankings with an open hand on the behind. CP 64. Ms. Wing remembered that while at a restaurant, she and Danny got into an argument after Danny had taken J to the bathroom and spanked him. CP 66. The police were called because other people at the restaurant mistakenly thought that Ms. Wing and Danny were arguing about Danny beating their baby. RP 66. At a later interview, Ms. Wing recalled that

she had taken J to the bathroom at the restaurant and spanked him on his bottom for soiling his diaper. CP 161.

Danny took Ms. Wing and the children to his cousin's apartment, to see if they could stay there. CP 68. Ms. Wing waited in the car with the children while Danny went inside. See CP 68. The baby kept crying and screaming. CP 68. Ms. Wing stated that J placed his hand over the baby's mouth and nose to try to keep him quiet, and that she yelled at him to stop. CP 68. When Danny returned, she told him this. See CP 68-69. Danny returned because he heard the commotion and said they could not stay there because of all the noise they were making. CP 68. Danny hit J. CP 68. Shortly thereafter, they went to a McDonald's restaurant. CP 69. At McDonald's, Danny took J back into the van and hit him some more. CP 69. When they left McDonald's, Ms. Wing drove. CP 69. While she drove, Danny hit J more, shoved his fingers down J's throat, and cursed at him for hurting the baby. CP 69. At the hotel, Danny continued to hit J. CP 73. Ms. Wing held a towel over J's mouth to stifle the noise he was making. CP 73. Danny tried to condition J to say that "Mickey and Ben" had been the people who hurt him. CP 74. Danny spent hours doing this. CP 79.

The abuse from Danny continued. CP 76. Ms. Wing admitted that she abused J too. CP 76. She made him do laps in the room and spanked

him if he stopped. CP 76. She pulled J off the ground once by his hair, pulling his hair out. CP 77. She helped restrain J by binding his hands. CP 80. She also held J down and covered his mouth while Danny applied a blow dryer to J's skin. CP 77. Danny believed that applying heat would hide the bruising. CP 78. While sleeping, Ms. Wing would hear Danny abusing J. CP 78. J was hurt so badly that a girl called 911 after seeing him. CP 74-75. Ms. Wing wanted to take J to a hospital, but Danny would not let her. CP 78. He threatened to take their children if Ms. Wing did so. CP 79.

Around September 15, 2014, they moved to a house in the town of Vader, Washington. CP 81. Zackery Kidder, a young man who had lived with the Wings before, resided there with them. CP 81. Ms. Wing and Danny told Mr. Kidder that J was abused by others. CP 81.

For about six days, Danny went to jail in connection with heroin and assaulting an undercover police officer. CP 85, 93. Ms. Wing denied hitting J while Danny was in jail. CP 86. She recalled, however, that she was still "messed up on heroin" at this time. CP 86.

After Ms. Wing bailed Danny out of jail, the abuse continued. CP 93. This included spraying water and alcohol in J's eyes, putting his head underwater in the sink, and hitting him. CP 90, 94. Mr. Kidder participated. CP 90. Danny head-butted and punched J, resulting in J



being unconscious for three days. CP 95. While J was unconscious, he lost two of his front teeth when Danny used a toothbrush in an effort to ensure that J did not swallow his tongue. CP 101. Danny, Ms. Wing, and Mr. Kidder tried to wake J using baths. RP 95, 97. When Ms. Wing realized that J was not breathing, she told Danny, who said J was “faking it.” CP 97. She begged Danny for permission to 911. CP 97. Eventually Danny dialed 911 and gave the phone to Ms. Wing. CP 97.

They made up a story about how J had only recently been dropped off into their care by J’s mother. CP 98. They offered money to people to be witnesses for them. CP 102-03. While Danny had inflicted the worst abuse, Ms. Wing admitted she and Mr. Kidder had abused J. CP 98.

Ms. Wing submitted to a polygraph administered by Sergeant T.R. Dehart of the Washington State Patrol on September 15, 2015. Supp. CP (Sub. 129). Sergeant Dehart was instructed to investigate five areas regarding: (1) who took J into the bathroom at the restaurant (2) how Ms. Wing was able to see that Danny was sticking his fingers down J’s throat while she was driving; (3) Ms. Wing’s participation in J’s “conditioning”; (4) Ms. Wing’s statement that she did not hit J when Danny was in jail; and (5) the application of marijuana to J. Supp. CP (Sub. 129). Ms. Wing recalled helping in the conditioning by making J walk and by asking J who hit him. Supp. CP \_\_ (Sub. 129). She could not remember disciplining J

by flicking him while Danny was in jail. Supp. CP \_\_ (Sub. 129). She denied taking J into the bathroom and abusing him at the restaurant. Supp. CP (Sub. 129). On the polygraph, she was asked if she told the truth today about J's injuries. Supp. CP \_\_ (Sub. 129).

Sergeant Dehart concluded that Ms. Wing was being deceptive, but the scoring was actually inconclusive. Supp. CP \_\_ (Sub. 129). Sergeant Dehart was not a licensed polygraphist. RP 9, 15. Washington does not license polygraphists. RP 9, 15. Although Ms. Wing's attorney had not expressly agreed that Sergeant Dehart could speak with Ms. Wing after the interview, Sergeant Dehart did so. Supp. CP \_\_ (Sub. 129). Sergeant Dehart asked Ms. Wing how she thought she did, to which Ms. Wing said she thought she did "pretty good." Supp. CP \_\_ (Sub. 129). Sergeant Dehart followed up, asking why she thought so. Supp. CP \_\_ (Sub. 129). Sergeant Dehart then wrote that after going over the statements again, Ms. Wing told him that she lied to Danny about J covering her baby's nose and mouth. Supp. CP \_\_ (Sub. 129). She explained she was scared. Supp. CP \_\_ (Sub. 129).

Later that day or the next day,<sup>4</sup> Ms. Wing called her mother, Shelly Ward, from the county jail. CP 107. In the recorded call, Ms. Wing said

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<sup>4</sup> The first page of the transcript recounts that the recording is from September 15, 2016 while the last page recounts that the recording is from September 16, 2016. CP 107, 115.

that she did not pass the polygraph. CP 107. She explained that this related to her lie to Danny:

[Ms. Wing] -- (unintelligible) something (unintelligible) something that I lied to Danny about, about back, back then was weighing heavy on my heart when I was in there.

...

[Ms. Ward]. Will they let you retake it?

[Ms. Wing]. That's what they told me (unintelligible) let me retake it if I told him what was weighing heavy on my heart and then they just got my, my confession (unintelligible). They didn't even (unintelligible) polygraph test, but it says in the plea agreement that John [Ms. Wing's lawyer] that we could take another one.

...

[Ms. Wing]. I told Danny something [J] did that he didn't do and he beat him up for it. He beat the shit out of him for it.

[Ms. Ward]. Why did you tell him he did something he didn't do?

[Ms. Wing]. I don't know 'cause I'm a lying piece of shit.

[Ms. Ward] 'Cause what?

[Ms. Wing] 'Cause I'm a lying piece of shit. I don't know.

[Ms. Ward] Well-

[Ms. Wing] God knows the only reason why it happened (unintelligible). I didn't expect Danny to fucking do what he did, but that was the start of it. That's what started everything. That's what started all the fucking abuse. It

just started everything. I felt guilt. I (unintelligible) I went in there and I could not put it away.

CP 109-11.

On September 29, 2015, the State moved to find Ms. Wing in violation of the agreement and to refile the aggravators. CP 29, 34. Based on Ms. Wing's admission that her account of J putting his hand over her baby's mouth and nose was false, the State argued that Ms. Wing was not truthful during her interview on June 2, 2015. CP 32. The State argued this was material because after she made the statement, Danny beat J. CP 33-34. The State argued this resulted in a violation of §7(a) of the agreement, which required proof that Ms. Wing:

provided a false statement regarding a material fact as demonstrated by irrefutable evidence agreed to by the defense, or in the absence of agreement, by the defendant's failure of two polygraphs administered by licensed polygraphists, one of whom is selected by the defense.

CP 47.

On October 28, 2015, Ms. Wing submitted to a second polygraph selected by the State, this time from a licensed polygraph examiner. CP 158. Ms. Wing provided a statement on four areas related to the abuse of J. CP 161. After asking Ms. Wing whether she lied in any part of these statements, the polygraphist concluded that Ms. Wing was deceptive. CP 160.

On November 18, 2015, Ms. Wing moved to enforce the plea agreement or for permission to withdraw her guilty plea. CP 121. She argued there had been no violation of §7(a). CP 126.

The parties appeared before the court on November 20, 2015, which was the date set for sentencing. RP 3. The State moved for the court to find that Ms. Wing had violated the agreement by lying during her interview. CP 4, 11-12. The State also complained that Ms. Wing was supposed to have submitted to another polygraph selected by the defense, but had not done so. RP 5. Ms. Wing argued she had not violated the agreement and that the State had violated the agreement by seeking to refile the aggravators. RP 7-8; CP 121-22. After hearing these brief arguments, the court ruled it was not going to find that the State breached the agreement. RP 14. The court further ruled that it would continue the matter if Ms. Wing agreed to submit to another polygraph from a licensed polygraphist. RP 14. Otherwise, the court stated it would rule that Ms. Wing breached the agreement. RP 14. Ms. Wing agreed to take another polygraph and sentencing was continued. RP 14-16.

Ms. Wing took two more polygraphs conducted by Roger Cook, a licensed polygraphist, on December 11, 2015 and January 21, 2016. CP 195, 198. Questions were asked related to J's abuse. CP 196, 199. Mr.

Cook concluded that Ms. Wing's responses were consistent with truthfulness. CP 196, 199.

On January 22, 2016, the parties again appeared for sentencing and for argument on the issue of whether there had been a breach of the agreement. RP 17. Both sides also submitted written arguments. CP 162-64, 188-89. The State continued to insist that Ms. Wing had been dishonest and that she had therefore violated the agreement. RP 19-23; CP 163. The State additionally argued that three of the statements Ms. Wing made during the October polygraph test were inconsistent with her earlier statement. RP 19-20; CP 163-65. Ms. Wing did not agree that she provided false statements of material fact and noted she had passed two of the three polygraphs that were conducted by licensed polygraphists. RP 24-25; CP 189-90. Therefore, she argued there was no violation of §7(a). RP 24-25; CP 189-90.

Rather than conduct an evidentiary hearing, the court heard from the parties' attorneys in a back and forth discussion. RP 18-38. Despite not hearing any testimony and not listening to the jail recording, the court concluded that Ms. Wing had materially breached the agreement and that the State had satisfied §7(a). RP 18, 40-41; CP 167-69.<sup>5</sup> Over Ms. Wing's objection, the State submitted the previously alleged aggravators

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<sup>5</sup> A copy of the court's order is attached in "Appendix B."

in a new information. RP 42-44; CP 170-72. The court ruled these aggravators were deemed to be stipulated by Ms. Wing under the agreement. RP 56; CP 169, 178.

The State asked for an exceptional sentence of 660 months along with fines and legal financial obligations. RP 44, 46. The court sentenced Ms. Wing to 416 months of total confinement, which was the same amount of time that Danny had been sentenced to earlier. RP 46, 57; CP 180. The court imposed legal financial obligations. RP 58; CP 182-83. Ms. Wing appeals.

#### **E. ARGUMENT**

**1. Without holding an evidentiary hearing, the court ruled Ms. Wing violated the plea agreement, violating constitutional due process.**

**a. Before a defendant may be held in violation of a plea agreement, constitutional due process requires an evidentiary hearing.**

Criminal defendants have the right to due process of law under article I, § 3 of the Washington Constitution and the Fourteenth Amendment to United States Constitution. Const. art. I, § 3; U.S. Const. amend. XIV. Constitutional due process requires that the State adhere to the terms of plea agreements with defendants. Santobello v. New York, 404 U.S. 257, 92 S. Ct. 495, 30 L.Ed.2d 427 (1971); State v. Sledge, 133 Wn.2d 828, 839, 947 P.2d 1199 (1997). Constitutional issues, like

questions of law, are reviewed de novo. State v. Gresham, 173 Wn.2d 405, 419, 269 P.3d 207 (2012).

Unless the defendant has not complied with the agreement, the State is obliged to perform its end of the agreement. In re Personal Restraint Pet. of James, 96 Wn.2d 847, 849-50, 640 P.2d 18 (1982). To establish that the defendant has violated the agreement, fundamental fairness under due process requires:

an evidentiary hearing be held and that the defendant be given an opportunity to call witnesses and have other due process rights, including the requirement that the State prove, by a preponderance of the evidence, that the defendant has failed to perform his or her part of the agreement.

Id. at 850. This “procedure is constitutionally required.” Id. Even when a defendant does not ask for an evidentiary hearing, the right is not waived. Id. at 851; State v. Morley, 35 Wn. App. 45, 47-48, 665 P.2d 419 (1983). Thus in James and Morley, both courts reversed because the defendants had not been afforded an evidentiary hearing on the issue of breach of the plea bargain. James, 96 Wn.2d at 852; Morley, 35 Wn. App. at 47-49.

**b. Depriving Ms. Wing of due process, the court failed to conduct an evidentiary hearing on the issue of whether Ms. Wing breached her agreement with the State.**

Here, the trial court did not conduct an evidentiary hearing on whether Ms. Wing breached the plea agreement. Rather, the court simply



heard arguments from the parties on the issue. This is insufficient. The court did not hear any testimony, which could have provided context to the statements cited by the State. Moreover, there was no determination that the evidence relied upon by the State, such as the jail recording, was admissible. The court did not even listen to the jail recording. Rather, the court only read a cold transcript of the recording. To determine whether Ms. Wing had been dishonest about a material fact, sworn testimony would have been highly probative.

While Ms. Wing did not request an evidentiary hearing, she did not knowingly, voluntarily, and intelligently waive this right. James, 96 Wn.2d 851. She argued that she was in compliance with the plea agreement. RP 25. As in James and Morley, reversal and remand is required.

Simmons, a case cited by our Supreme Court in James, is instructive. United States v. Simmons, 537 F.2d 1260, 1261 (4th Cir. 1976). There, after entering into a plea agreement, the defendants pleaded guilty. Id. The government agreed to recommend a sentence of 15 years and, in exchange, the defendants would provide information. Id. After the defendants were interviewed, the government concluded they had violated the agreement by not making full disclosures. Id. Without a hearing and in the absence of adequate evidence to find that the defendants had broken

their agreements, the court imposed the government's recommended sentences of 18 years. Id. The appellate court reversed even though the defendants had not asked for a hearing. Id. at 1261-62.

This Court's decision in Roberson is also illustrative. There, the defendant argued for the first time on appeal that the State had violated the plea agreement. State v. Roberson, 118 Wn. App. 151, 158, 74 P.3d 1208 (2003). The State responded that it was excused from doing so because the defendant had not complied with the agreement based on two polygraphs. Id. at 155-56. Citing the rule from James and recognizing that this dispute could not properly be resolved on appeal, this Court reversed and remanded for an evidentiary hearing. Id. at 159.

In addition to the foregoing precedent, there is persuasive unpublished authority supporting reversal and remand when the trial court fails to conduct an evidentiary hearing on whether a defendant breached a plea agreement. GR. 14.1(a) ("unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate."). For example, in Galeazzi, this Court reversed because the trial court failed to conduct an evidentiary hearing on whether the defendant violated the plea agreement by committing new crimes. State v. Galeazzi, Nos. 69963-6-I, 700060-0-

I, noted at 181 Wn. App. 1023 (2014); 2014 WL 2574034. Similarly, in Hudson, this Court also reversed for the same reason. State v. Hudson, No. 73938-7-I, noted at 192 Wn. App. 1003 (2015); 2015 WL 9462105. Consistent with James, in both Galeazzi and Hudson, this Court remanded for an evidentiary hearing.

Similar to the foregoing cases, due process also demanded that the court hold an evidentiary hearing before ruling that Ms. Wing was in breach of the plea agreement. The issue of breach was highly contested. An evidentiary hearing was necessary to determine whether the State met its burden to prove that Ms. Wing breached the agreement.

The remedy is remand to the trial court with instruction to conduct an evidentiary hearing at which the burden will be on the State to prove that Ms. Wing failed to comply with the terms of the plea agreement. James, 96 Wn.2d at 850-51; Roberson, 118 Wn. App. at 159. If the State fails to meet its burden, Ms. Wing then has the option of either specific enforcement of the agreement or withdrawal of her plea. Roberson, 118 Wn. App. at 159. Even if the State meets its burden, Ms. Wing will be entitled to a new sentencing hearing. Id.; Sledge, 133 Wn.2d at 846. Because the trial court has already expressed its views on the issues of breach and on an appropriate sentence, the proceedings on remand should be before a different judge. Sledge, 133 Wn.2d at 846 & n.9.

**2. As a matter of law, the trial court misconstrued the plea agreement by disregarding the plain language of §7(a). Properly interpreted and applying the undisputed facts, the State failed to prove a violation under §7(a). This Court should reverse with instruction that Ms. Wing can either enforce the agreement or withdraw her plea.**

While Ms. Wing is at least entitled to reversal and remand for an evidentiary hearing, this Court should take the additional step of interpreting the plea agreement. Properly interpreted and applying the undisputed facts, as a matter of law, the State failed to prove that Ms. Wing violated the plea agreement. Rather, the State violated the agreement. Accordingly, instead of remanding for an evidentiary hearing, this Court should reverse and remand with instruction that Ms. Wing be permitted to enforce the agreement or withdraw her plea. Sledge, 133 Wn.2d at 846; Roberson, 118 Wn. App. at 159.

Interpretation of a contract is a legal issue reviewed de novo. State v. Bisson, 156 Wn.2d 507, 517, 130 P.3d 820 (2006). In general, principles of contract law are applicable when interpreting plea agreements. See State v. Thomas, 79 Wn. App. 32, 39, 899 P.2d 1312 (1995). “Where the terms of a contract are plain and unambiguous, the intention of the parties shall be ascertained from the language employed.” 4105 1st Ave. S. Investments, LLC v. Green Depot WA Pac. Coast, LLC, 179 Wn. App. 777, 784, 321 P.3d 254 (2014). However, due to

constitutional concerns, the appellate court “cannot read any term in a way the defendant did not understand at the time of the entry of the plea.”

Thomas, 79 Wn. App. at 39. Here, because the State authored the agreement, RP 29, ambiguities are construed against State. See Bisson, 156 Wn.2d at 521-23.

The key provision at issue was §7(a) of the agreement. In its entirety, this section reads:

Ensuring Truthfulness: To ensure Brenda A. Wing testifies consistently with her truthful and complete statement as outlined in number 2 above, the State shall be entitled to re-file the Manslaughter in the 1<sup>st</sup> degree enhancements if the State can demonstrate by a preponderance of evidence to the trier-of-fact that Brenda A. Wing either:

- (a) provided a false statement regarding a material fact *as demonstrated by irrefutable evidence agreed to by the defense, or in the absence of agreement*, by the defendant’s failure of two polygraphs administered by licensed polygraphists, one of whom is selected by the defense;

CP 47 (emphasis added).<sup>6</sup>

Applying the plain language of this provision, Ms. Wing argued that the State could not prove breach. RP 24. Concerning a false statement of material fact, she did *not* agree that irrefutable evidence proved this. CP 189; RP 24, 37. Further, Ms. Wing did not fail two

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<sup>6</sup> A footnote as to this provisions states that as to polygraphs, “Inconclusive results do not determine truth or deception; therefore a re-test may be administered.” CP 47 n.2.

polygraphs administered by licensed polygraphists. As to polygraphs administered by licensed polygraphists, she passed two and failed one. RP 25; CP 160, 196, 199. Accordingly, because Ms. Wing did not agree that she provided a false statement regarding a material fact as demonstrated by irrefutable evidence and she did not fail two polygraphs administered by licensed polygraphists, the State failed to meet its burden to prove §7(a).

In response to questioning from the court, the State argued the language, “as agreed to by the defense,” meant only whether or not the statement was material. RP 26-27. Ultimately, however, the State convinced the court to read the language out of the agreement. RP 25-32, 40. The State referred the court to the first section of agreement, which stated that the “essence of this plea agreement” was that Ms. Wing “truthfully describe all that she remembers and truthfully answer all of the State’s questions to the best of her ability.” CP 46. The State argued it would be unreasonable to give the language in §7(a) its plain meaning because “it disregards what the court’s responsibility here would be with regard to the burden of proof.” RP 27. Disregarding the plain language of §7(a), the court ruled that Ms. Wing’s interpretation was unreasonable:

But I agree with Mr. Halstead. If we are talking about that “with which the defendant agrees,” that means the defendant, all he has to do -- or she has to do in this case --

is come in and say, “We don’t agree,” and this agreement can be based on nothing other than just, “Well, we don’t agree.” And that cannot possibly be a reasonable construction of this agreement between the state and the defendant.

RP 40.

“An interpretation of a contract that gives effect to all provisions is favored over an interpretation that renders a provision ineffective, and a court should not disregard language that the parties have used.”

Snohomish County Pub. Transp. Benefit Area Corp. v. FirstGroup Am., Inc., 173 Wn.2d 829, 840, 271 P.3d 850 (2012). Here, the court’s interpretation disregards the language used in §7(a). If the State wanted the agreement to read differently, it should have simply excluded the language: “as demonstrated by irrefutable evidence agreed to by the defense, or in the absence of agreement.” These words cannot be disregarded in the name of “construction.” Cf., Thomas, 79 Wn. App. 40 (reasoning that the “words used in the agreement do not support the State’s construction” of the plea agreement.). And because the State was the drafting party, any ambiguity resulting from conflicting provisions should be read in Ms. Wing’s favor, not the State’s.

Moreover, Ms. Wing relied on the language in signing the agreement. As Ms. Wing’s attorney recounted, “Ms. Wing did not sign this proffer agreement by reviewing it in a 20 to 30-second period. This

language was focused on.” RP 28. It is fair to infer that Ms. Wing relied on this language in deciding to plead guilty. Even if the State’s reading were a fair one, nothing in the record establishes that Ms. Wing, at the time she entered her plea, 5/7/15RP 2-11, was advised of or understood the meaning that the State now ascribes to §7(a). See Thomas, 79 Wn. App. 41 (reasoning that even if the language of the plea bargain could be read as advocated by the State, the record did not show that the defendant understood this). Thus, it would violate due process to construe the agreement in the manner advocated by the State.

The trial court misconstrued the agreement. It follows that the State violated the agreement by refiling the aggravators. This Court should reverse and remand with instruction that Ms. Wing may withdraw her guilty plea or seek specific enforcement of the agreement. Proceedings should be before a different judge. Sledge, 133 Wn.2d at 846 & n.9.

**3. The State did not meet its burden to prove that Ms. Wing provided “a false statement regarding a material fact as demonstrated by irrefutable evidence,” as required under the plea agreement. The court erred in concluding that Ms. Wing materially breached the agreement.**

Even assuming that the court properly construed the agreement and that no evidentiary hearing was necessary, the court still erred in



determining that Ms. Wing materially breached the agreement. Because there was no material breach, this Court should reverse.<sup>7</sup>

De novo review applies to this issue. While the trial court purported to make findings as to the issue of a material breach of the agreement, CP 168, the court did hear any testimony and relied solely on written documents. CP 167 (“the court reviewed the pleading[s] submitted by the parties, reviewed the file and contents therein and heard the argument of the parties.”). When the record “consists entirely of written documents and the trial court therefore was not required to assess the credibility or competency of witnesses, and to weigh the evidence, nor reconcile conflicting evidence, the appellate court reviews de novo.” Dolan v. King County, 172 Wn.2d 299, 310, 258 P.3d 20 (2011).

A material breach is “defined as one that substantially defeats the purpose of the contract.” Mitchell v. Straith, 40 Wn. App. 405, 410, 698 P.2d 609 (1985). In other words, it is a breach that is “so significant it excuses the other party’s performance and justifies rescission of the contract.” Park Ave. Condo. Owners Association v. Buchan Developments, L.L.C., 117 Wn. App. 369, 383, 71 P.3d 692 (2003).

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<sup>7</sup> If the court reverses for either reason discussed in sections 1 and 2 of the argument, this issue need not be reached.

The court found that Ms. Wing breached the agreement by being untruthful on four different topics. CP 168. The court found that two of these breaches were material by themselves. CP 168. The court further found that the other two breaches were sufficiently material when combined with the others. CP 168.

In concluding that Ms. Wing had breached the agreement by providing false statements, the court appears to have disregarded the language in the agreement requiring “irrefutable evidence.” CP 47. Thus, in reviewing the court’s findings, this Court should keep in mind that the State bore the burden of proving by a preponderance of the evidence that Ms. Wing “provided a false statement regarding a material fact as demonstrated by *irrefutable* evidence . . . .” CP 47 (emphasis added). Irrefutable evidence is evidence “[i]ncapable of being disproved or countered effectively.” IRREFUTABLE, Black’s Law Dictionary (10th ed. 2014); cf. Webster’s Webster’s Third New International Dictionary, 1196 (1993) (defining “irrefutable” as meaning “impossible to refute”).

One of the breaches that the court found material when considered individually or when combined with others related to the “conditioning” of J:

2. The defendant was untruthful when she talked about the conditioning of the victim to avoid responsibility in the injuries suffered by the victim. During her Proffer

statement, the defendant discussed abuse used by her husband during the conditioning of the victim and failed to disclose her role in the conditioning. During a polygraph interview, the defen[d]ant disclosed hitting the victim and holding the victim down to be hit by her husband during [sic] conditioning.

CP 168.

This finding was premised on Ms. Wing's admission from the polygraph on October 28, 2015. There, Ms. Wing signed a statement that:

During the conditioning with [J], I would hit him on his bottom, sometimes above and below his bottom, I would sometimes hold him ([J]) down while Danny Wing was hitting him. This was to keep [J] from getting hurt worse by Danny Wing. I may have flicked [J] in his throat during [the] conditioning.

CP 161.

The State argued this showed that Ms. Wing had been dishonest because "when she talked to us she told us that she had nothing at all to do with that at all." RP 20. The transcript of the interview does not support the State's argument. CP 49-106. Moreover, Ms. Wing admitted to putting a towel in J's mouth when Danny was hitting him during this conditioning. CP 74-75. She also confessed to running water or turning the television volume up so that people could not hear J scream. CP 75. She

further admitted to holding J down while Danny burned him using a blow dryer in an attempt to hide J's bruises. CP 78.

That Ms. Wing later remembered and disclosed that she had also hit J on his bottom during the conditioning does not prove by "irrefutable evidence" she had been untruthful earlier. Further, even assuming a breach, this breach was immaterial because Ms. Wing admitted to assisting in the conditioning. This Court should conclude that Ms. Wing's latter disclosure about the conditioning did not constitute either a breach or a material breach of the agreement.

The other area which the court found was a material breach by itself related to Ms. Wing not disclosing that J had not actually placed his hands on her baby:

4. The defendant was untruthful during her Proffer statement when she talked about the incident which led to the abuse. The defendant, during her Proffer statement indicated she told her husband the victim placed his hands on their young son. During a polygraph interviews [sic] and during a telephone call to a family member the defendant admitted this was not the truth and she had, in fact, never seen the victim do such a thing.

CP 168.

This was neither a material fact nor did it result in a material breach. Ms. Wing truthfully disclosed that Danny hit J after she told

Danny that J had placed his hands on their baby's mouth and nose. That J, in fact, had not done so was immaterial. The State got what it had bargained for, which were disclosures from Ms. Wing about the abuse perpetrated on J. This Court should hold that Ms. Wing's failure to disclose the lie she told to Danny did not materially breach the agreement.

The other two findings, for which the court found were not material breaches standing alone, related to the incident at restaurant and the time when Danny had been in jail, both of which were discussed by Ms. Wing during her interview. Concerning the restaurant incident, the court found:

1. The defendant was untruthful when she described abuse suffered by the victim while in Oregon. The defendant did not disclose her hitting the victim in Oregon during the Proffer statement, but later disclosed the information during the polygraph examination that she did strike the victim.

CP 168.

This is incorrect. When Ms. Wing participated in a polygraph examination on October 28, 2015, she recalled she had taken J into a public restroom at a restaurant in Oregon and spanked him once on the bottom for soiling his diaper. CP 159, 161. This is not "irrefutable evidence" that Ms. Wing was untruthful when she spoke about the

restaurant before. There, she recalled that Danny had taken J into the restroom. But she may have simply misremembered.

Further, this was immaterial. The State learned that J had been spanked in the restroom. Ms. Wing also admitted to spanking J herself many other times. CP 76.

This Court should conclude that the trial court erred in finding that Ms. Wing was untruthful about abuse suffered by J while in Oregon. Alternatively, the Court should conclude any untruthfulness as to who spanked J at the restaurant was immaterial.

Concerning the time when Danny had been in jail, the court found:

3. The defendant was untruthful during her Proffer statement when she talked about abuse suffered by the victim while her husband was in jail. During the Proffer statement, the defendant said the victim was not hit during this time. During a polygraph interview, the defendant disclosed she would force the victim to do laps, stand in the corner and would strike him for soiling his diaper.

CP 168.

In her statement, Ms. Wing stated that she did not hit J while Danny was in jail. CP 86. She did not deny disciplining J. In the polygraph interview on October 28, 2015, she recalled that she had actually spanked J on his bottom for soiling himself. CP 161. She also recalled that she made J do “laps” and stand in the corner for discipline.

CP 161. She remembered flicking J in the mouth while they were residing at the house in Vader, but was unsure if this happened while Danny was in jail. CP 161.

This is not “irrefutable evidence” that Ms. Wing was untruthful when she stated she did not hit J while Danny was in jail. That she later recalled that she had spanked him and may have also possibly flicked J in the mouth does not prove dishonesty. As for the laps and standing in the corner, Ms. Wing had not denied using these forms of discipline on J while Danny was in jail. There was no false statement in this area.

Any untruthfulness in this area was immaterial. At other times, Ms. Wing admitted to flicking J, spanking him, making him do laps, and requiring him to stand in the corner. CP 64, 76-77, 94. That Ms. Wing did not state during the interview that she had spanked J in his bottom area while Danny was in jail is immaterial.

This Court should conclude that the trial court erred in finding that Ms. Wing was untruthful about abuse suffered by J while Danny was in jail. Alternatively, the Court should conclude any untruthfulness as to a failure to disclose spankings during this time was immaterial.

In sum, the State failed to prove by irrefutable evidence that Ms. Wing provided a false statement regarding a material fact. Regardless, the State did not prove that any breach was material. This Court should

reverse with instruction that Ms. Wing be permitted to withdraw her plea or to enforce the agreement.

**4. Before imposing legal financial obligations, the trial court must conduct an inquiry into the defendant's ability to pay. Without conducting the necessary inquiry and failing to recognize the burden imposed, the court erred in ordering thousands of dollars in legal financial obligations.**

In addition to recommending 660 months (55 years) in prison, the State asked the trial court to impose \$3,000 in legal financial obligations (LFOs). RP 46; CP 182. After imposing 416 months in total confinement, the court accepted the State's request for legal financial obligations because they "were not argued [against], so they will be ordered as recommended." RP 58. The court ordered that Ms. Wing pay \$10 a month while incarcerated and \$25 a month 60 days after her release.

The \$3,000 in legal financial obligations consisted of a \$500 victim penalty assessment fee, a \$100 domestic violence assessment, a \$200 criminal filing fee, a \$1,000 fine for violation of the uniform controlled substances act, a \$100 crime lab fee, a \$100 DNA collection fee, and \$1,000 for Lewis County Jail costs. CP 182. At least \$2,200 of in legal financial obligations were discretionary. See RCW 10.99.080(1), (5) (domestic violence assessment); RCW 69.50.430(1) (fine for violation of uniform controlled substances act); RCW 43.43.690(1) (crime lab fee); RCW 9.94A.760(2) (incarceration costs).



Before imposing discretionary legal financial obligations, the trial court is required to take into account the defendant's resources and the burden the costs will impose:

The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160(3). Moreover, the trial court must make “an individualized inquiry into the defendant's current and future ability to pay.” State v. Blazina, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). The court must consider factors, such as incarceration and a defendant's other debts, including restitution,<sup>8</sup> when determining a defendant's ability to pay. Id.

The sentencing court should also examine whether the defendant is indigent under GR 34. Id.; City of Richland v. Wakefield, No. 92594-1, slip op., 2016 WL 5344247, at \*4 (Wash. Sept. 22, 2016). If a person meets the GR 34 standard for indigency, the trial court “should seriously question that person's ability to pay LFOs.” Blazina, 182 Wn.2d at 839.

In Wakefield, our Supreme Court reiterated that imposing legal financial obligations on indigent defendants can be particularly punitive. Wakefield, at \*5. Typically, “a person who pays \$25 per month toward

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<sup>8</sup> Ms. Wing was later ordered to pay \$120 in restitution. CP 203.

their LFOs will owe the State more 10 years after conviction than they did when the LFOs were initially assessed.” Blazina, 182 Wn.2d at 836. Accordingly, the Wakefield court instructed that “trial courts should be cautious of imposing such low payment amounts in the long term for impoverished people.” Wakefield, at \*5.

Here, the trial court failed to engage in the requisite inquiry and failed to recognize the burden it was imposing. Rather, the court only made a cursory inquiry, asking Ms. Wing “whether there’s anything about you physically, mentally, emotionally or financially that would prohibit you from finding employment to be able to pay off these financial obligations if I set it at a reasonable rate, say, \$25 a month upon your release from custody?” RP 47. This does not comply with RCW 10.01.160(3) or Blazina. And the court’s viewpoint that imposing \$25 a month as being “reasonable” is contradictory to Wakefield.

Although Ms. Wing did not raise this issue below, this Court has discretion to address the issue. Blazina, 182 Wn.2d at 830. Due to the hardship legal financial obligations will impose on Ms. Wing while incarcerated and after her release, this Court should do so. This is consistent with recent decisions from this Court. See, e.g., State v. Hart, No. 47069-1-II, slip. op; 2016 WL 4366948, at \*6 (Wash. Ct. App. Aug. 16, 2016); State v. Cardenas–Flores, 194 Wn. App. 496, 521, 374 P.3d

1217 (2016). Accordingly, this Court should remand for a hearing on legal financial obligations.

**5. No costs should be awarded for this appeal.**

If Ms. Wing does not prevail in this appeal, the State may request appellate costs. RCW 10.73.160(1); RAP 14.2. This Court has discretion under RAP 14.2 to decline an award of costs. State v. Nolan, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); State v. Sinclair, 192 Wn. App. 380, 388, 367 P.3d 612 (2016). This means “making an individualized inquiry.” Sinclair, 192 Wn. App. at 391 (citing Blazina, 182 Wn.2d at 838). A person’s ability to pay is an important factor. Id. at 389.

Accepting Ms. Wing’s declarations, the trial court found Ms. Wing indigent. Supp. CP \_\_ (sub. nos. 153, 154, 162). This creates a presumption of indigency that continues on appeal. RAP 15.2(f); Sinclair, 192 Wn. App. at 393. Given Ms. Wing’s indigent status, lack of income, and her lengthy sentence, this Court should exercise its discretion and rule that no costs will be awarded. Cf. Sinclair, 192 Wn. App. at 392-93 (declining State’s request for costs in light of defendant’s indigency and lack of evidence or findings showing that defendant’s financial situation would improve).

## **F. CONCLUSION**

The State did not prove that Ms. Wing violated the agreement. This Court should reverse and instruct that Ms. Wing may enforce the agreement or withdraw her plea. Alternatively, the Court should reverse and remand for an evidentiary hearing on the issue of breach.

DATED this 17th day of October, 2016.

Respectfully submitted,

/s Richard W. Lechich  
Richard W. Lechich – WSBA #43296  
Washington Appellate Project  
Attorney for Appellant

# Appendix A

## ***Proffer Agreement for Brenda A. Wing***

1. Parties, Purpose & Essence: This agreement is between the Lewis County Prosecutor Attorney's Office (LCPA) and Brenda A. Wing. The purpose of Brenda A. Wing making this proffer is to provide LCPA with an opportunity to assess the value, extent, and truthfulness of her information about the criminal activity of herself and others as it relates to what happened to Jasper Henderling-Warner. The essence of this plea agreement is as follows and all subsequent paragraphs shall be understood to facilitate this essence:
  - (a) Brenda A. Wing agrees to truthfully describe all that she remembers and truthfully answer all of the State's questions to the best of her ability.
  - (b) The State agrees to dismiss with prejudice the Homicide by Abuse charge against Brenda A. Wing, so long as Brenda A. Wing fulfills part (1)(e) of this agreement.
  - (c) If Brenda A. Wing tells the truth during interview(s) and if necessary, testifies truthfully with these statements at trial, the State shall offer Manslaughter 1<sup>st</sup> Degree-DV and other charges which would result in her having an offender score of 6 (six). All of the charges would be without enhancements or aggravators<sup>1</sup> but all charges would not merge or be considered same criminal conduct by the parties. Each party would then be free to argue within the standard sentence range. (i.e. 146-194 months based upon her current offender score of 6).
  - (d) If Brenda A. Wing is not truthful during the interview(s) or trial(s), then the State add enhancements to the Manslaughter 1<sup>st</sup> Degree Domestic Violence & Assault in the 3<sup>rd</sup> Degree Domestic Violence charges. Each party would then be free to argue between the low end of the standard range and the maximum penalty (i.e. Life imprisonment).
  - (e) Brenda A. Wing agrees to plead guilty pursuant to the terms of this agreement as summarized here and elaborated upon below.
2. Information: Brenda A. Wing will provide truthful and complete information, with no material misstatements or omissions of fact, relating directly or indirectly to any criminal activity related to the abuse or death of Jasper Henderling-Warner. Brenda A. Wing will neither attempt to protect any person who has been involved in criminal activity, nor falsely implicate any person in criminal activity. Such statement shall be a videotaped statement (under penalty of perjury to law enforcement at an agreed upon time and location). This video shall become part of discovery and a copy shall be provided to Danny Wing and Brenda A. Wing's respective counsel, as well as the counsel of any other person who may be charged with a crime related to the abuse or death of Jasper Henderling-Warner. Any statement provided by Brenda A. Wing may be corroborated by the State as true and/or she may pass a series of polygraph examinations (the number of exams and scope of questions to be determined by the State after consultation between the state examiner and the defense polygraphist with

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<sup>1</sup> For purposes of this agreement the words enhancement(s) and aggravator(s) are used interchangeably as it will be up to the State, and only the State, to determine which enhancement(s) or aggravator(s) shall be added to the information if it is discovered Brenda A. Wing has violated the terms of this agreement.

deference given to the examiners in this area of their expertise). Upon completion of the examination(s) defense examiner shall timely have an opportunity to review polygraph data. Should the State believe that Brenda's statement(s) contain material misstatements or omissions of material fact, then the parties' shall proceed with the plea outlined in number 4, but the defendant is subject to the procedure outlined in number 7.

3. No Direct Use of Statements: If the parties are unable to reach a plea agreement for any reason, the LCPA agrees that statements made by Brenda A. Wing during this proffer agreement may not be used in the LCPA or State's case-in-chief against Brenda A. Wing should a trial be held for any charges pending or later filed in the course of this or any other investigation.
4. Plea Offer: In exchange for the information provided and verified pursuant to paragraph number 2, Brenda A. Wing shall enter pleas of guilty to the charges of **Manslaughter in the 1<sup>st</sup> Degree (Domestic Violence), two counts of Possession of Heroin, one count of Assault of a Child in the 3<sup>rd</sup> Degree (Domestic Violence), and two counts of Tampering with a Witness, each charge with no enhancement(s)**. If each party complies with this agreement then at sentencing each party will be free to argue for a sentence, they deem appropriate, that is within the standard sentencing range given Brenda A. Wing's offender score of 6.
5. Dismissal: In exchange for the information provided and verified pursuant to paragraph number 2, and the pleas to Manslaughter in the 1st Degree – Domestic Violence, Possession of Heroin (2 counts), Assault of a Child in the 3<sup>rd</sup> Degree – Domestic Violence, and Tampering with a Witness (2 counts), the LCPA shall dismiss with prejudice, Count 1 of the current information, Homicide by Abuse. After Brenda A. Wing provides information to the State, the only way the State can proceed against Brenda A. Wing with a Homicide by Abuse charge, is if Brenda A. Wing refuses to plead guilty to **Manslaughter in the 1st Degree – Domestic Violence, Possession of Heroin (2 counts), Assault of a Child in the 3<sup>rd</sup> Degree – Domestic Violence, and Tampering with a Witness (2 counts), each charge with no enhancements (or with enhancements pursuant to the terms of paragraph 7) and elects to take this matter to trial.**
6. Change of Plea: Brenda A. Wing will enter her plea of guilty to **Manslaughter in the 1st Degree – Domestic Violence, Possession of Heroin (2 counts), Assault of a Child in the 3<sup>rd</sup> Degree – Domestic Violence, and Tampering with a Witness (2 counts)**, on a court date between May 1 and May 6, 2015 selected by either the State or Defense, and mutually agreeable to the other. The parties agree and stipulate that each criminal count Brenda A. Wing pleads guilty to pursuant to this agreement will not be same criminal conduct or merge for the purpose of sentencing.
7. Ensuring Truthfulness: To ensure Brenda A. Wing testifies consistently with her truthful and complete statement as outlined in number 2 above, the State shall be entitled to re-file the Manslaughter in the 1<sup>st</sup> degree enhancements if the State can demonstrate by a preponderance of evidence to the trier-of-fact that Brenda A. Wing either:
  - (a) provided a false statement regarding a material fact as demonstrated by irrefutable evidence agreed to by the defense, or in the absence of agreement, by the defendant's failure of two polygraphs<sup>2</sup> administered by licensed polygraphists, one of whom is selected by the defense. or

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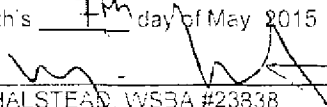
<sup>2</sup> Inconclusive results do not determine truth or deception; therefore a re-test may be administered.

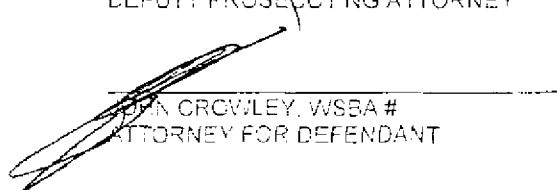
(b) testified inconsistently and/or untruthfully with his video statement on a material fact at any trial at which she is called to testify as a witness.

8. If 7(a) or (b) occurs, then Brenda A. Wing shall immediately waive jury trial prior to the commencement of or during her trial (or anyone else's trial who may be charged regarding the death of Jasper Henderling-Warner) and the State may re-file, without objection, the enhancements as to the Manslaughter 1 – DV and Assault Child 3 –DV cases, in what should then become a one-day sentencing hearing which may occur after the resolution of anyone else's case who is charged in relation to the death of Jasper Henderling-Warner. Brenda A. Wing will then enter pleas of guilty (stipulate there are sufficient facts) to the enhancements that did exist at the time of the Manslaughter 1 Domestic Violence and the Assault of a Child in the Third Degree- Domestic Violence. Significantly, the Manslaughter charge being a Class A felony the State could seek any amount of confinement time up to Life in prison.
9. The Defense could potentially provide (a) a tangible piece of physical evidence that is likely to contain relevant evidence; and/or (b) if given the opportunity, encourage an eyewitness to give truthful testimony to incidents Brenda A. Wing did not witness. Should the defendant do either of these which results in additional information incriminating a person other than Brenda A. Wing in the abuse/death of Jasper Henderling-Warner, then the State shall consider these as potential mitigating factors that may be considered when making a recommendation to the sentencing Court. This section will not apply to any evidence or witnesses the State is presently aware of.
10. No disclosure of cooperation: Brenda A. Wing agrees not to reveal this cooperation or any information about this agreement, investigation, or prosecution to anyone, without the prior consent of the LCPA unless to do so would violate any ethical rules, court rules, or place her or her attorney in a dangerous situation. A violation of this paragraph will constitute a breach of this agreement.
11. Brenda A. Wing and her attorney, John Crowley, understand this agreement constitutes discovery and shall be turned over to any party who is charged in relation to the death of Jasper Henderling-Warner

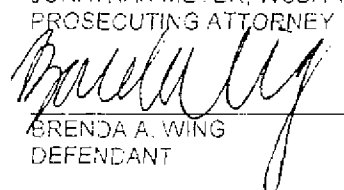
I have carefully reviewed every part of this agreement with my attorney, John Crowley. After having considered the risks and benefits of this agreement, the risks and benefits of taking this matter to trial, and after fully discussing this agreement with Mr. Crowley, I understand and voluntarily agree to be bound by its terms.

Dated this 7<sup>th</sup> day of May, 2015

  
WILL HALSTEAD, WSBA #23838  
DEPUTY PROSECUTING ATTORNEY

  
JOHN CROWLEY, WSBA #  
ATTORNEY FOR DEFENDANT

\_\_\_\_\_  
JONATHAN MEYER, WSBA #  
PROSECUTING ATTORNEY

  
BRENDA A. WING  
DEFENDANT



# Appendix B

1  
2 Rec'd & Filed  
Lewis County Superior Court

3 JAN 22 2016

4  
5 Kathy A. Brack, Clerk *tw*  
By Deputy 147

6  
7 SUPERIOR COURT OF WASHINGTON  
8 COUNTY OF LEWIS

9 STATE OF WASHINGTON,

No. 14-1-00635-1

10 Plaintiff,

ORDER ON MOTION TO  
FIND BREACH OF THE  
PROFFER AGREEMENT

11 vs.

12 BRENDA ANN WING,

13 Defendant.

 ORIGINAL

14  
15 This matter came before the court upon the motion of each party to find the other party  
16 in breach of the Proffer Agreement. The state was represented by Prosecuting Attorney  
17 Jonathan L. Meyer and Senior Deputy Prosecuting Attorney William Halstead. The  
18 defendant was present and represented by her attorney of record John Crowley.

19  
20 Further, the court reviewed the pleading submitted by the parties, reviewed the file and  
21 contents therein and heard the argument of the parties. It is now therefore

22  
23 ORDERED, ADJUDGE and DECREED the state **did not** breach the Proffer Agreement  
24 as suggested by the defendant. Further, it is hereby

25  
26  
27  
28  
29  
30 MEMORANDUM IN SUPPORT OF  
MOTION TO FIND VIOLATION OF  
PROFFER AGREEMENT

Page 1 of 3

LEWIS COUNTY  
PROSECUTING ATTORNEY  
345 W. Main Street, 2<sup>nd</sup> Floor  
Chehalis, WA 98532  
360-740-1240 (Voice) 360-740-1497 (Fax)

1 ORDERED ADJUDGED and DECREED the defendant did breach the Proffer  
2 Agreement. The breeches, as found by this court are:  
3

- 4 1. The defendant was untruthful when she described abuse suffered by the  
5 victim while in Oregon. The defendant did not disclose her hitting the victim in  
6 Oregon during the Proffer statement, but later disclosed the information  
7 during a polygraph examination that she did strike the victim.
- 8 2. The defendant was untruthful when she talked about the conditioning of  
9 the victim to avoid responsibility in the injuries suffered by the victim. During  
10 her Proffer statement, the defendant discussed abuse used by her husband  
11 during the conditioning of the victim and failed to disclose her role in the  
12 conditioning. During a polygraph interview, the defenant disclosed hitting the  
13 victim and holding the victim down to be hit by her husband during during  
14 conditioning.
- 15 3. The defendant was untruthful during her Proffer statement when she  
16 talked about abuse suffered by the victim while her husband was in jail.  
17 During the Proffer statement, the defendant said the victim was not hit during  
18 this time. During a polygraph interview, the defendant disclosed she would  
19 force the victim to do laps, stand in the corner and would strike him for soiling  
20 his diaper.
- 21 4. The defendant was unthruthful during her Proffer statement when she  
22 talked about the incident which led to the abuse. The defendant, during her  
23 Proffer statement indicated she told her husband the victim placed his hands  
24 on their young son. During a polygraph interviews and during a telephone call  
25 to a family member the defendant admitted this was not the truth and she  
26 had, in fact, never seen the victim do such a thing.

27 Each of the above four (4) items are a breach of the Proffer Agreement. One (1)  
28 and three (3), by themselves, may not be sufficient to find the breach materail,  
29 but are sufficient when combined with the others. Items two (2) and four (4) either  
30 when considered with the others, or when considered individually, are sufficient  
to find a material breach of the Proffer Agreement.

1 Further, it is hereby

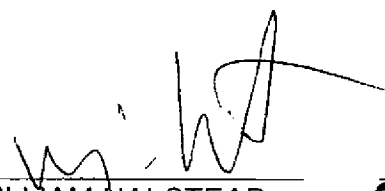
2 ORDERED ADJUDGED and DECREED the state is allowed to file the aggravating  
3 factors outlined in the Proffer Agreement.


4 Further, it is hereby


5 ORDERED ADJUDGED and DECREED that, based upon the Proffer Agreement, the  
6 defendant has stipulated facts sufficient for the finding these aggravating factors are  
7 present.

8  
9 Dated: 01.22.16

10  
11   
12 JUDGE NELSON HUNT

13  
14   
15 WILLIAM HALSTEAD  
16 Deputy Prosecuting Attorney  
17 WSBA No. 23838

18   
19 JOHN CROWLEY  
20 Attorney for Defendant  
21 WSBA No. 19868

22   
23 BRENDA A. WING  
24 Defendant

25  
26 AS TO FORM  
27 ONLY

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO**

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 48623-7-II
v.	)	
	)	
BRENDA WING,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17<sup>TH</sup> DAY OF OCTOBER, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] SARA BEIGH, DPA [appeals@lewiscountywa.gov] LEWIS COUNTY PROSECUTING ATTORNEY 345 W MAIN ST FL 2 CHEHALIS, WA 98532	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-MAIL VIA COA PORTAL
[X] BRENDA WING 388367 WACC FOR WOMEN 9601 BUJACICH RD NW GIG HARBOR, WA 98332	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 17<sup>TH</sup> DAY OF OCTOBER, 2016.

X \_\_\_\_\_

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, WA 98101  
Phone (206) 587-2711  
Fax (206) 587-2710

# WASHINGTON APPELLATE PROJECT

**October 17, 2016 - 4:22 PM**

## Transmittal Letter

Document Uploaded: 4-486237-Appellant's Brief.pdf

Case Name: STATE V. BRENDA WING

Court of Appeals Case Number: 48623-7

**Is this a Personal Restraint Petition?** Yes ☐ No ☒

### The document being Filed is:

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_\_

Answer/Reply to Motion: \_\_\_\_\_

☒ Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

### Comments:

No Comments were entered.

Sender Name: Maria A Riley - Email: [maria@washapp.org](mailto:maria@washapp.org)

A copy of this document has been emailed to the following addresses:

[appeals@lewiscountywa.gov](mailto:appeals@lewiscountywa.gov)